GONG v. HONG

HIGH COURT MALAYA, KUALA LUMPUR
EVROL MARIETTE PETERS J
[JOINT DIVORCE PETITION NO: WA-33JP-168-02-2021]
24 NOVEMBER 2024

Abstract – *(i) Any application for variation must strictly adhere to the Divorce and Matrimonial Proceedings Rules 1980 which mandates a full disclosure of property and income details. Non-compliance with these requirements would be detrimental to the success of such application. Such rules are to ensure not only transparency and equity, but also to facilitate proper assessment of financial needs and obligations of parties. The ultimate goal of such rules is to promote fair and transparent resolution of issues raised; (ii) A court order, once agreed to and finalised, should be respected and upheld unless there is material change in circumstances that justifies a revision. The legal standard for varying an agreed court order is deliberately set high to prevent parties from revisiting terms they later find inconvenient or unappealing. Courts are not in a position to pander to the needs of litigants who agree to terms and then decide that it is not working out to come to court to air their grievances.*

FAMILY LAW: *Divorce – Consent order – Variation – Husband and wife filed joint petition for divorce, resulting in court order – Court order provided terms for custody and access of children, spousal and child maintenance and matrimonial home – Application by wife to vary terms of order – Whether order should be open to variation – Whether wife complied with correct procedure for filing application – Whether wife had set out full particulars of property and income – Divorce and Matrimonial Proceeding Rules 1980, r. 63*

FAMILY LAW: *Children – Custody, care and control – Husband and wife filed joint petition for divorce, resulting in court order – Court order provided that sole custody, care and control of children given to husband while wife given access at all times, including staying access – Application by wife to vary terms of order on custody, care and control – Allegations on husband's parenting skills – Whether there were material change in circumstances warranting variation of terms of court order – Whether sole custody, care and control ought to be given to wife*

FAMILY LAW: *Maintenance – Spousal maintenance – Husband and wife filed joint petition for divorce, resulting in court order – Court order provided that wife to receive monthly spousal maintenance of RM1,500 – Application by wife to vary terms of order on spousal maintenance – Wife sought for increase to monthly sum of RM5,000 – Allegation that funds insufficient to support herself – Whether claim for higher maintenance grounded on genuine need – Whether there were extraordinary circumstances to justify increase of spousal maintenance*

FAMILY LAW: *Maintenance – Child maintenance – Husband and wife filed joint petition for divorce, resulting in court order – Court order provided that both parties required to contribute RM2,500 to shared fund for children, with any additional expenses to be equally divided between parties – Application by wife to vary terms of order on child maintenance – Request by wife that child maintenance of RM10,000 be paid directly into her bank account – Whether there was significant alteration in living situations, needs or well-being of children – Whether there was compelling reason to increase child maintenance*

FAMILY LAW: *Matrimonial property – Matrimonial home – Husband and wife filed joint petition for divorce, resulting in court order – Court order provided that wife had liberty of continuing to reside in matrimonial home, with room exclusively reserved for her – Allegation by wife that husband had forcibly removed or banished her from matrimonial home – Application by wife to vary terms of order on occupancy of matrimonial home – Whether variation sought reasonable and for welfare of children*

The petitioner-husband ('PH') and the petitioner-wife ('PW') were married in 2006, and they were blessed with three children. In 2021, the parties filed a joint petition for divorce, at the High Court, resulting in a consent order which provided that, *inter alia*, (i) the PH was given sole custody, care and control of the children while the PW was given access at all times, including staying access; (ii) the PW was to receive a monthly spousal maintenance of RM1,500; (iii) both parties were required to contribute RM2,500 to a shared fund for the children, with any additional expenses to be equally divided between the parties; and (iv) despite the divorce, the PW had the liberty of continuing to reside in the matrimonial home, with a room exclusively reserved for her, which was off-limits to the PH. The PW filed the present application to vary the terms of the consent order, including: (i) a transfer of custody, care and control of the children, from the PH to herself, with the PH to be granted visitation rights only. In her effort to establish that there was material change in circumstances warranting a variation of the terms of the court order pertaining to custody, the PW presented a range of allegations against the PH to demonstrate that his parenting skills were detrimental to the well-being of the children. Specifically, the PW alleged that the PH (a) lacked the ability or commitment to provide adequate care for the children; (b) had not adequately supervised the children's education or enforced discipline; (c) allowed the children to miss tuition classes, which reflected his failure to prioritise their academic needs; (d) left the children unattended when he travelled out of town, posing a risk to the children's safety and displaying a lack of appropriate parental supervision; (e) neglected the children's health; (ii) an increase in child and spousal maintenance and for the PH to either cover the cost of renting or, in the alternative, accommodation for her or to purchase a house of equivalent value to the matrimonial home. The PW further sought an increase to a monthly sum of

RM5,000 as her funds were insufficient to support herself. The PW then requested child maintenance of RM10,000 to be paid directly into her bank account; and (iii) an attachment of the PH's earnings. The PW, in claiming that the PH did not pay child maintenance, sought for an attachment order on the PH's employer to automatically deduct all the payments payable, if any, to the PW from the PH's monthly salary. The issues that arose for adjudication were: (i) whether the PW had complied with the correct procedure for filing this application; (ii) whether a consent order should be open to variation; (iii) whether there were material changes regarding: (a) custody and access; (b) spousal and child maintenance; and (c) the PW's occupancy of the matrimonial home; (iv) whether the variation sought would be reasonable and for the welfare of the children; and (v) whether an attachment of earnings order was justified.

Held (dismissing application with costs):

(1) At the outset, the issue was whether the PW had complied with r. 63 of the Divorce and Matrimonial Proceeding Rules 1980 ('Rules') which required her to affirm an affidavit setting out full particulars of her property and income. Rule 63 was specifically relevant to this case as it deals with the variation of financial provisions, particularly spousal and child maintenance. A perusal of the affidavits submitted by the PW revealed that she had not provided a complete, honest and transparent account of her assets, including both movable and immovable properties, as well as her bank and credit card statements, which were necessary to detail her property and income. Since full particulars were not sufficiently disclosed, the application should be dismissed. (paras 8, 11 & 14)

(2) The PW's allegations aimed to demonstrate a pattern of behaviour on the part of the PH that, in her view, constituted a material change in circumstances significant enough to justify varying the terms of the custody arrangement stipulated in the court order. In response to the PW's allegations: (i) that the PH was an absent father, no evidence was presented to substantiate such claim. On the contrary, the evidence adduced had highlighted the PH's proactive efforts to meet his parental responsibilities. Moreover, the home environment he provided for the children was characterised as supportive and nurturing, underscoring his active involvement in creating a stable and positive atmosphere conducive to the children's well-being; (ii) that the PH neglected the children's health, there was no evidence provided by the PW to substantiate such claim. On the contrary, evidence presented by the PH highlighted his active involvement in the children's lives and his efforts to positively contribute to their upbringing. This evidence portrayed a father who was engaged and committed to learning and growing in his role, rather than one who was neglectful or absent; (iii) of skipping school, missing tuition classes, choir and Latin dance competitions, the

PH admitted that he had done so, but that it was to enable him to return to his hometown. Despite such admission, this was not material change in circumstances for the reason that, *inter alia*, activities such as tuition, choir, and Latin dance do not fall within the legal definition of 'education.' Tuition classes are meant to supplement formal education and are not compulsory. Choir and Latin dance focus mainly on artistic skills, such as rhythm, movement, melody and harmony. While these skills may be valuable, they are not considered core competencies in most educational systems, which emphasises academic subjects like literacy, numeracy, and scientific knowledge – foundations essential for broader educational and career opportunities. As far as missing school was concerned, although it must be frowned upon, a single instance of missing class did not reflect a lapse in parental responsibility or a disregard for the children's educational needs; (iv) the PH left the children at home alone, unsupervised, while he travelled out of town, the PW was actually aware of the PH's travel plans but had selectively highlighted incidents to bolster her case in this application. Furthermore, although the children were indeed unsupervised, the eldest child at that time was 14 years old, which suggested a reasonable degree of maturity. (paras 32, 36-39, 41 & 43-45)

(3) The PW additionally sought sole guardianship of the children. However, the court order did not address the matter of guardianship. Given this omission, in the interest of justice, guardianship should be shared. Guardianship was presumed to be a joint responsibility between both parties unless compelling reasons were presented to warrant otherwise. The PW had not provided sufficient evidence or arguments to substantiate why such an arrangement would better serve the children's welfare. In matters of guardianship, the best interests of the children must be prioritised, taking into account factors such as stability, emotional well-being, and the ability of each parent to provide care. Given the absence of convincing evidence to support a sole guardianship arrangement, there was no justification to deviate from the default joint guardianship structure. (paras 46-48)

(4) The PW had been living beyond her means, incurring expenses that were not justifiable based on her financial resources. Her claim for higher maintenance were not grounded on a genuine need but rather, an attempt to sustain a lifestyle which she could not afford without undue financial support from the respondent. The PH should not be burdened with the expectation of providing ongoing additional spousal support simply because the PW chose to live beyond her means. Without evidence of extraordinary circumstances, such as unforeseen health issues, significant changes in living conditions or other substantial hardships, there was no justifiable reason to increase the financial

burden on the paying spouse, namely the PH. Moreover, the fact that the PW was employed indicated that she had the capacity to generate her own income and contribute to her own financial stability. (paras 51-52, 56 & 58)

(5) There would be no variation to the existing terms concerning the custody, care and control of the children. Without a significant alteration in the living situations, needs or well-being of the children, there was no compelling reason to increase the child maintenance. The PH, who had sole custody, care and control of the children, presented a detailed breakdown of their expenses. The PH's monthly income was approximately RM14,000, of which RM12,000 was allocated to cover his ongoing monthly commitments, including expenses for the children. The current financial arrangement was appropriate and adequately addressed the children's needs. There was no justification for revising the financial terms in the court order. (paras 61-63)

(6) The evidence adduced suggested that the parties had ongoing disputes over their living arrangements, but there was no credible indication that the PH had forcibly removed or banished the PW from the matrimonial home. On the contrary, the evidence adduced clearly demonstrated that the PH was against her decision to leave. It appeared that the PW's departure was a unilateral choice, and not one driven by any coercive action on the part of the PH. The PW's claim was without merit and lacked foundation. The current terms of their living arrangement were those that were mutually agreed upon. This court was not in a position to reconsider those terms solely due to disagreements or disputes that had since arisen between them. The PW's request to vary the terms of the court order, based merely on conflicts she had with the PH, lacked the necessary legal justification for intervention. Further, the PW's decision to unilaterally move out of the matrimonial home and reside in a rental property nearby would not provide the same stability for the children. The children have remained in the matrimonial home, a place where they had spent the entirety of their upbringing and where they had developed a sense of familiarity, stability and routine. The continuity of this environment was important as it had been central to their sense of security and normalcy throughout their lives. A rented accommodation lacked the permanence and consistency of the matrimonial home, making it difficult for the PW to offer the same secure environment. The unpredictability associated with rented housing, including potential changes in tenancy and the temporary nature of the arrangement, posed a challenge to maintaining a stable and certain environment for the children. (paras 66, 71, 85 & 87)

(7) There was no evidence that the current arrangement, pertaining to the custody and maintenance of the children, were unsatisfactory. The PW failed to prove that the terms of the current arrangement were unreasonable or detrimental to the welfare of the children. On the other hand, the PH had demonstrated that the children were taken care of to the best of his ability. (para 83)

(8) This application was specifically for ancillary relief. Rule 2 of the Rules do not include an attachment of earnings order within the definition of ancillary relief. If the PW intended to pursue an attachment of earnings order, she should have filed a separate application. This application should not be confused with an application for attachment of earnings. Additionally, there was no sufficient basis or evidence presented to support the PW's request for an attachment of earnings order. Moreover, an attachment or earnings order is a significant and stringent enforcement measure, one that requires careful consideration by the court. Based on the facts and circumstances of this case, an attachment of earnings order would not serve the interest of justice. (paras 90-91 & 94-96)

Case(s) referred to:

Anna Tay Siew Hong v. Joseph Ng Tiong Yong [1995] 3 CLJ 717 HC ***(refd)***
Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo [2002] 1 CLJ 721 CA ***(refd)***
Gan Koo Kea v. Gan Shiow Lih [2003] 4 CLJ 539 HC ***(refd)***
Gisela Gertrud Abe v. Tan Wee Kiat [1986] 2 CLJ 202; [1986] CLJ (Rep) 133 SC ***(refd)***
Lau Hui Sing v. Wong Chuo Yong [2008] 9 CLJ 232 HC ***(refd)***
Lim Hong Bee v. Mah Teck Oon [2010] 8 CLJ 473 HC ***(refd)***
Navarajan Subramaniam v. Rajeswary Muniandy [2019] CLJU 1014; [2019] 1 LNS 1014 HC ***(refd)***
Ng Say Chuan v. Lim Szu Ling [2010] 10 CLJ 371 HC ***(refd)***
Ngu Chu Chiong v. Lina Soo [2008] 2 CLJ 783 CA ***(refd)***
Sean O'Casey Patterson v. Chan Hoong Poh & Ors [2011] 3 CLJ 722 FC ***(refd)***
Sim Bee Khim v. Eugene Leong Weng Kong [2021] CLJU 916; [2021] 1 LNS 916 HC ***(refd)***
Sivajothi K Suppiah v. Kunathasan Chelliah [2006] 5 CLJ 318 HC ***(refd)***
Tan Siew Kee v. Chua Ah Boey [1987] CLJU 77; [1987] 1 LNS 77 ***(refd)***
Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(refd)***
Thelagavathi Murugesu v. Karuppusamy K Munisamy [2010] CLJU 65; [2010] 1 LNS 65 HC ***(refd)***
W v. H [1987] 2 MLJ 235 ***(refd)***
Wong Kim Foong v. Teau Ah Kau [1998] 1 CLJ 358 HC ***(refd)***
Yong Jia Hui v. Chan Seh Wai [2023] CLJU 762; [2023] 1 LNS 762 HC ***(refd)***

Legislation referred to:

Divorce and Matrimonial Proceedings Rules 1980, rr. 2, 61, 63
Evidence Act 1950, s. 157
Guardianship of Infants Act 1961, ss. 5, 11
Law Reform (Marriage and Divorce) Act 1976, ss. 83, 84, 88(2), 96, 97
Married Women and Children (Enforcement of Maintenance) Act 1968, ss. 4, 5, 7, 8

For the petitioner-husband – Lim Qing Yen; M/s Gary Lee & Partners
For the petitioner-wife – Chan Kang Wai; M/s Ng Zainurul, Seke & Khoo

Reported by Najib Tamby

JUDGMENT

Evrol Mariette Peters J:

Introduction

[1] This was an application ("this application") in encl. 13 by the petitioner-wife, who sought to vary the terms of a consent order granted in March 2021.

[2] In the interest of privacy of all parties concerned, and sensitivity of the issues in these proceedings, the petitioner-husband and petitioner-wife have been anonymised in this judgment as GONG and HONG, respectively.

The Factual Background

[3] The petitioners ("the parties") were married in December 2006 and were blessed with three children ("the children") born respectively in 2009, 2011 and 2014.

[4] In February 2021, the parties filed a joint petition for divorce in the Kuala Lumpur High Court, resulting in a court order issued in March 2021 ("the court order"). The following terms, which were relevant to this application, had been agreed upon by the parties:

a) Hak jagaan, pemeliharaan dan kawalan (custody, care and control) untuk ***, *** dan *** (selepas ini dirujuk secara kolektif sebagai "Anak-Anak tersebut") hendaklah diberikan kepada Pempetisyen Suami, dan bahawa Pempetisyen Isteri akan diberikan akses pada setiap masa, termasuk akses penginapan dengan Anak-Anak tersebut (access at all times, including staying access);

b) Pempetisyen-Pempetisyen menanggung sebanyak 50% daripada Nafkah Anak-Anak tersebut masing-masing, iaitu RM2,500.00 sebulan bagi Pempetisyen Suami dan RM2,500.00 bagi Pempetisyen Isteri dengan terma-terma seperti berikut:-

   (i) Pempetisyen-Pempetisyen membuat bayaran Nafkah Anak-Anak tersebut sebelum hari ketujuh setiap bulan, mulai dari tarikh *Dekri Nisi*, dalam Bank Akaun Gabungan Pempetisyen-Pempetisyen di Hong Leong Bank Berhad No: *** (selepas ini dirujuk sebagai "Akaun Gabungan HLBB");

   (ii) Pempetisyen-Pempetisyen hanya dibenarkan untuk membuat transaksi-transaksi pegeluaran wang yang meliputi perbelanjaan kos pendidikan, perbelanjaan hidup (living expenses), perbelanjaan dalam perubatan dan pergigian Anak-Anak tersebut; bil elektrik TNB, Syabas dan wifi untuk Hartanah Kediaman tersebut;

(iii) Sekiranya bulanan Nafkah Anak-Anak tersebut adalah tidak mencukupi, Pempetisyen-Pempetisyen akan menanggung jumlah lebihan perbelanjaan secara sama rata;

(iv) Sekiranya Anak-Anak tersebut ingin meneruskan pelajarannya ke tahap pengajian ijazah (tertiary education) selepas sekolah menengah, Pempetisyen-Pempetisyen akan menanggung segala perbelanjaan dan yuran pengajian tinggi (tertiary education) Anak-Anak tersebut secara sama rata, dan

(v) Nafkah bulanan tersebut, segala Perbelanjaan lebihan dan Perbelanjaan dan Yuran Pengajian Tinggi hendaklah diteruskan sehingga Anak-Anak tersebut mencapai umur 21 tahun atau menyelesaikan pengajian tinggi (Tertiary Education), mana yang lebih lewat.

…

d) Pempetisyen Suami membayar nafkah sebanyak RM1,500.00 sebulan kepada Pempetisyen Isteri. Pempetisyen Suami hendaklah membayar nafkah tersebut kepada Pempetisyen Isteri pada atau sebelum hari ketujuh setiap bulan, mulai dari tarikh *Dekri Nisi*. Pembayaran nafkah tersebut akan diberhentikan sekiranya Pempetisyen Isteri berkahwin semula;

f) Pempetisyen Isteri dibenarkan untuk terus tinggal di dipegang dibawah Geran Mukim Nos. 608, 609 & 737, Lot Nos. 567, 568 & 566, Mukim dan Daerah Petaling, Tempat 8 ½ Sungai Besi Kuyow, Negeri Selangor dan mempunyai alamat di C11-G-2, The Sanderson Villa, Jalan Cemara, Tmn Bukit Serdang, Seksyen 13, 43300 Seri Kembangan, Selangor ("Hartanah Kediaman tersebut") dengan terma-terma seperti berikut:-

(i) Pempetisyen Isteri akan memiliki sebuah bilik (bilik kedua atau ketiga) sebagai bilik eksklusif Pempetisyen Isteri dimana Pempetisyen Suami tidak dibenarkan memasuki bilik tersebut tanpa keizinan Pempetisyen Isteri;

(ii) Pempetisyen-pempetisyen tidak dibenarkan membawa pasangannya atau kawan-kawan untuk menginap di Hartanah Kediaman dalam sebarang keadaan kecuali mendapat keizinan daripada Pempetisyen-Pempetisyen; dan

(iii) Pempetisyen Suami akan menanggung ansuran bulanan bank dan caj peryelenggaran Hartanah Kediaman tersebut termasuk kumpulan wang pelepas, insuran kebakaran (housing loan monthly instalments and maintenance charges including sinking fund, fire insurance).

[5] In December 2023, the petitioner-wife filed this application seeking several changes, including a transfer of custody, care, and control of the children from the petitioner-husband to herself, with the petitioner-husband to be granted visitation rights only. She also requested an increase in child

and spousal maintenance, and for the petitioner-husband to either cover the cost of renting alternative accommodation for her or to purchase a house of equivalent value to the matrimonial home. Additionally, the petitioner-wife sought an attachment of the petitioner-husband's earnings.

The Issues

[6] The main issues for consideration were as follows: (i) whether the petitioner-wife had complied with the correct procedure for filing this application; (ii) whether a consent order should be open to variation; (iii) whether material change in circumstances regarding custody and access had been established; (iv) whether material change in circumstances regarding spousal and child maintenance had been established; (v) whether material change in circumstances regarding petitioner-wife's occupancy of the matrimonial home had been established; (vi) whether the variation sought would be reasonable and for the welfare of the children; and (vii) whether an attachment of earnings order was justified.

[7] This application was dismissed for the following reasons.

Contentions, Evaluation, And Findings

Whether The Petitioner-wife Had Complied With The Correct Procedure For Filing This Application

[8] At the outset, the issue was whether the petitioner-wife had complied with r. 63 of the Divorce and Matrimonial Proceedings Rules 1980 ("Divorce and Matrimonial Proceedings Rules"), which required her to affirm an affidavit setting out full particulars of her property and income. Rule 63 of the Divorce and Matrimonial Proceedings Rules reads:

> Rule 63 – Evidence on application for variation order
>
> (1) An application for a variation order shall be supported by an affidavit by the applicant **setting out full particulars of his property and income** and the grounds on which the application is made.
>
> (2) The respondent to the application may, within 14 days after service of the affidavit, file an affidavit in answer. (emphasis added)

[9] The petitioner-wife contended that there was no necessity to comply with r. 63 of the Divorce and Matrimonial Proceedings Rules, as she submitted that the applicable provision was r. 61 of the Divorce and Matrimonial Proceedings Rules, which reads:

> Rule 61 – General provisions as to evidence *etc.* on application for ancillary relief
>
> (1) A petitioner or respondent who has applied for ancillary relief in his petition or answer and who intends to proceed with the application before a registrar shall, subject to Rule 84, file a notice in Form 12 and within four days after doing so serve a copy on the other spouse.

A (2) **Where a respondent or a petitioner is served with a notice in Form 11 or 13 in respect of an application for ancillary relief, not being an application to which Rule 62 or 63 applies then,** unless the parties are agreed upon the terms of the proposed order, he shall, within 13 days after service of the notice, file an affidavit in answer to the application containing full particulars of his property and
B income, and if does not do so, the court mat order him to file an affidavit containing such particulars.

(3) Within 14 days after service of any affidavit under paragraph (2) or within such other time as the court may fix, the applicant shall file an affidavit in reply containing full particulars of his property and
C income. (emphasis added)

[10] In my view, the petitioner-wife's interpretation of rr. 61 and 63 of the Divorce and Matrimonial Proceedings Rules were misguided. Rule 61 serves as the general guideline for applications regarding ancillary relief, while r. 63 is specifically relevant to this case, as it deals with the variation of
D financial provisions, particularly spousal and child maintenance.

[11] It was crucial to highlight that r. 63 of the Divorce and Matrimonial Proceedings Rules mandates a full disclosure of property and income details. However, a perusal of the affidavits submitted by the petitioner-wife revealed that she had not provided a complete, honest, and transparent account of her
E assets, including both movable and immovable property, as well as her bank and credit card statements, which were necessary to detail her property and income.

[12] The importance of r. 63 was underscored by the Court of Appeal in
F *Ngu Chu Chiong v. Lina Soo* [2008] 2 CLJ 783; [2008] 3 MLJ 42, where it was clearly stated that any application for variation must strictly adhere to the Divorce and Matrimonial Proceedings Rules. Non-compliance with these requirements would be detrimental to the success of such application.

[13] At this juncture, it was crucial to remind parties of the importance of
G complying with the rules of full disclosure of particulars of income and property. Such rules are undeniably to ensure not only transparency and equity, but also to facilitate proper assessment of financial needs and obligations of parties. The ultimate goal of such rules, therefore, was to promote fair and transparent resolution of the issues raised in this
H application.

[14] Since full particulars were not sufficiently disclosed, this application should have been dismissed. However, in the interest of completeness, I proceeded, nevertheless, to address the merits of this application.

Whether A Consent Order Should Be Open To Variation

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[15] It was crucial to note that both parties had mutually agreed to the terms set out in the court order. The key issue, therefore, was whether terms that had been agreed upon by both parties could be subject to a variation application.

[16] On this point, I found instructive the case of *Lau Hui Sing v. Wong Chuo Yong* [2008] 9 CLJ 232; [2008] 5 MLJ 846, where it was stated by Hamid Sultan Abu Backer J (as he then was) in the following passage:

> As a general rule, **consent order even in a divorce matter must be rarely disturbed unless there are exceptional circumstances** and that too clearly stated in the affidavit to warrant the intervention of the Court for the benefit of the minor children.
>
> Applying the above principle to the present case, the consent order must be honoured and complied with strictly by both parties, including the Petitioner Husband, since it was entered into voluntarily.
>
> (emphasis added)

[17] The court's attention was also brought to the cases of *Ng Say Chuan v. Lim Szu Ling* [2010] 10 CLJ 371, and *Sim Bee Khim v. Eugene Leong Weng Kong* [2021] CLJU 916; [2021] 1 LNS 916.

[18] In *Ng Say Chuan v. Lim Szu Ling*, it was clarified by Yeoh Wee Siam JC (as she then was) in the following passage:

> Bearing in mind again that the interim order is a **consent order**, it therefore **must be honoured and complied with by both parties.** As far as possible, a consent order **must rarely be disturbed** unless there are exceptional circumstances that warrant the intervention of the court.
>
> (emphasis added)

[19] In *Sim Bee Khim v. Eugene Leong Weng Kong*, Hayatul Akmal Abdul Aziz J, in endorsing *Ng Say Chuan v. Lim Szu Ling* held as follows:

> … An order can be varied at any time by the Court based on any circumstances so provided. *Ng Say Chuan v. Lim Szu Ling* (*supra*) said that **a consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the Court.** It is trite that consent orders must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the Court, and the burden is on RH to prove on a balance of probabilities that the need to vary legally existed. (emphasis added)

[20] Given this consensual basis, the court had to approach this application with careful consideration. This cautious approach was necessary because varying the terms of the court order that were previously consented to by both parties was not a trivial matter. Varying these terms required a compelling justification.

[21] Such careful approach by this court was warranted to ensure respect for the terms agreed upon by the parties and to promote stability and predictability in legal arrangements established through mutual consent. By requiring substantial reasons for any variation, the court strived to maintain the integrity of the consent order, thereby encouraging parties to rely on and uphold terms they had negotiated and agreed upon. This predictability was

essential in legal contexts as it provided certainty and clarity for parties involved, reducing the likelihood of frequent and arbitrary changes to legal orders and fostering a more stable legal environment.

[22] A cautious approach was, therefore, adopted in meticulously scrutinising the petitioner-wife's assertions, to ensure that this application was not based on irrelevant factors.

Material Change In Circumstances

[23] At the outset, it was important to note that this application was based on the following provisions, namely ss. 83, 84, 96, and 97 of the Law Reform (Marriage and Divorce) Act 1976 ("Law Reform (Marriage and Divorce) Act"), all of which read:

> Section 83 – Power for court to vary orders for maintenance
>
> The court may at any time and from time to time vary, or rescind, **any subsisting order for maintenance,** whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where **there has been any material change in the circumstances.**
>
> Section 84 – Power of court to vary agreements for maintenance
>
> Subject to section 80, the court may at any time and from time to time vary the **terms of any agreement as to maintenance** made between husband and wife, whether made before or after the appointed date, where it is satisfied that there has been **any material change in the circumstances** and notwithstanding any provision to the contrary in any such agreement.
>
> Section 96 – Power for court to vary orders for custody or maintenance
>
> The court may at any time and from time to time vary, or may rescind, any order **for the custody or maintenance of a child** on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or **where there has been any material change in the circumstances.**
>
> Section 97 – Power for court to vary agreement for custody or maintenance
>
> The court may at any time and from time to time vary the terms of any **agreement relating to the custody or maintenance of a child,** whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, **where it is satisfied that it is reasonable and for the welfare of the child so to do.** (emphasis added)

[24] Although it was not specifically articulated in submissions, the affidavits and submissions by the petitioner-wife indicated that the main ground she relied upon was a material change in circumstances as stipulated in ss. 83, 84 and 96 of the Law Reform (Marriage and Divorce) Act.

[25] The phrase "material change" has been emphasised in the case of *Sivajothi K Suppiah v. Kunathasan Chelliah* [2006] 5 CLJ 318; [2006] 3 MLJ 184 to mean not simply any change, as the operative word is 'material'. Such phrase has also been explained by George Seah SCJ in the Supreme Court case of *Gisela Gertrud Abe v. Tan Wee Kiat* [1986] 2 CLJ 202; [1986] CLJ (Rep) 133; [1986] 2 MLJ 297, in the following passage:

> In our opinion, when an application is made to the court to vary an existing order for maintenance, **the proper approach is to start from the original order and see what changes financial or otherwise, have taken place since that date** including any changes which the court is required to have regard to under s. 78 of the Act as well as any increase or decrease in the means of either of the parties to the marriage and make adjustments roughly in proportion to the changes, if that is possible. (emphasis added)

[26] Further elaboration of 'material change in circumstances' may be found in *Lim Hong Bee v. Mah Teck Oon* [2010] 8 CLJ 473; [2010] MLJU 264, where it was stated by Suraya Othman J (as she then was) that 'the change in question must be material and not just any change. It means a change in a crucial and vital part. In considering whether there has been any "material change" within the meaning of this section, all the relevant circumstances must be taken into account.'

[27] Hence, in examining the question of material change in circumstances, the inquiry is not simply whether there has been any material change *per se* since the court order was granted. The change must be sufficiently material, such that expecting the *status quo* to remain would not be justified.

[28] It was also crucial to note that the question of whether there was a material change in circumstances is a question of fact, as decided in the High Court case of *Anna Tay Siew Hong v. Joseph Ng Tiong Yong* [1995] 3 CLJ 717; [1995] MLJU 257. Reference was made also to the case of *Navarajan Subramaniam v. Rajeswary Muniandy* [2019] CLJU 1014; [2019] 1 LNS 1014; [2019] MLJU 715, where it was stated by Hayatul Akmal Abdul Aziz J, in the following passage:

> The legal definition of material change in circumstances is not cast in stone. It is ultimately **dependent upon the facts and circumstances of each case.** No one case is like the other. (emphasis added)

[29] As such, the petitioner-wife had the legal burden to prove on a balance of probabilities that there was in fact material change in circumstances pertaining to the terms of the current sole custody order as well as spousal and child maintenance that were mutually consented and agreed to.

Whether Material Change In Circumstances Regarding Custody And Access Had Been Established

[30] In this application, the petitioner-wife sought a transfer of custody, care, and control of the children from the petitioner-husband to herself, with the petitioner-husband to be granted visitation rights only.

[31] In her effort to persuade the court that there was material change in circumstances warranting a variation of the terms of the court order pertaining to custody, the petitioner-wife presented a range of allegations against the petitioner-husband. These allegations were made in an attempt to demonstrate that his parenting skills were detrimental to the well-being of the children. Specifically, the petitioner-wife alleged that the:

(i) petitioner-husband lacked the ability or commitment to provide adequate care for the children. This claim implied that the petitioner-husband was either unwilling or incapable of meeting the day-to-day needs of the children, such as providing a stable and nurturing environment;

(ii) petitioner-husband had not adequately supervised the children's education or enforced discipline. The petitioner-wife claimed that the petitioner-husband's lax approach negatively impacted the children's academic performance and behavioural development, potentially affecting their long-term growth and self-discipline;

(iii) petitioner-husband had allowed the children to miss tuition classes. This claim implied that the petitioner-husband had not prioritised or respected the additional educational support intended to help the children succeed academically. In her view, the absence from these classes reflected his failure to prioritise their academic needs;

(iv) petitioner-husband had left the children unattended when he travelled out of town. The petitioner-wife contended that this action posed a risk to the children's safety and showed a lack of appropriate parental supervision. The petitioner-wife further submitted that leaving them without adequate care could have subjected them to unnecessary risks and isolation, compromising their well-being; and

(v) petitioner-husband had neglected the children's health, suggesting that he had not taken appropriate steps to maintain or monitor their physical and emotional health. The petitioner-wife alleged that such neglect had demonstrated a disregard by the petitioner-husband for the children's welfare and had put their health at risk.

[32] The petitioner-wife's allegations aimed to demonstrate a pattern of behaviour on the part of the petitioner-husband that, in her view, constituted a material change in circumstances significant enough to justify varying the terms of the custody arrangement stipulated in the court order. She

contended that the petitioner-husband's actions, or lack thereof, illustrated a disregard for the children's best interests and compromised their development, safety, and overall well-being.

[33] I was unable to accept the petitioner-wife's contention for the following reasons. First and foremost, most of the allegations were unsubstantiated, and were challenged by the petitioner-husband in his affidavits. It was imperative to emphasise, at this stage, that affidavit evidence, given its inherent conflicts, cannot serve as the sole basis for deciding the truth of the matters averred, without the opportunity for cross-examination of the makers of the affidavits. To illustrate this principle, reference was made to the case of *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* [2002] 1 CLJ 721; [2002] 2 MLJ 97, in which the following was elucidated by Siti Norma Yaakob JCA (as she then was):

> Faced with such conflicting affidavit evidence, what the trial judge should have done was to sieve through such evidence, **consider only those that are undisputed or uncontroverted** and balance these with the consideration of what would work towards the betterment and interests of the four children. (emphasis added)

[34] The court's attention was also brought to the case of *Gan Koo Kea v. Gan Shiow Lih* [2003] 4 CLJ 539; [2003] 4 MLJ 770; [2003] 6 AMR 459, where it was emphasised that in light of conflicting accounts that have not been subjected to the rigorous processes of cross-examination and re-examination, which would occur in a full trial with *viva voce* evidence, the court's duty was to disregard the disputed facts. Instead, the court was obligated to base its decision solely on the undisputed facts.

[35] This fundamental aspect of civil litigation practice has been eloquently summarised by Lord Templeman for the Privy Council in *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24; [1987] MLRA 68; [1987] 1 MLJ 433, in the following words:

> At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then **in the absence of oral evidence or cross examination, the judge must ignore the disputed allegations.** The judge must then decide the fate of the petition by consideration of the undisputed facts. (emphasis added)

[36] In response to the allegation that the petitioner-husband was an absent father, no evidence was presented to substantiate such claim. On the contrary, the evidence adduced had highlighted the petitioner-husband's proactive efforts to meet his parental responsibilities. Moreover, the home environment he provided for the children was characterised as supportive and nurturing, underscoring his active involvement in creating a stable and positive atmosphere conducive to the children's well-being.

[37] In response to the allegation that the petitioner-husband neglected the children's health, there was, again, no evidence provided by the petitioner-wife to substantiate such claim. On the contrary, evidence presented by the petitioner-husband highlighted his active involvement in the children's lives and his efforts to positively contribute to their upbringing. This evidence portrayed a father who was engaged and committed to learning and growing in his role, rather than one who was neglectful or absent. This context was essential in evaluating the allegations made against the petitioner-husband regarding his parenting skills and involvement with the children.

[38] With regard to skipping school, missing tuition classes, choir and Latin dance competitions, the petitioner-husband admitted that he had done so, but that it was to enable him to return to his hometown. Despite such admission, I was unable to accept this as material change in circumstances for the following reasons.

[39] First and foremost, it was important to clarify that activities such as tuition, choir, and Latin dance do not fall within the legal definition of 'education.' Tuition classes are meant to supplement formal education and are not compulsory. Choir and Latin dance focus mainly on artistic skills, such as rhythm, movement, melody, and harmony. While these skills may be valuable, they are not considered core competencies in most educational systems, which emphasise academic subjects like literacy, numeracy, and scientific knowledge – foundations essential for broader educational and career opportunities.

[40] The decision to enrol a child in tuition or additional classes is a personal choice that varies from parent to parent. Some parents choose extensive tutoring to boost their child's academic performance and reinforce learning, while others favour a more balanced approach. They believe that overloading a child with too many extra activities can lead to stress and diminish the time available for formal homework, relaxation, and quality family moments. Each family's priorities and beliefs about what best supports a child's development play a significant role in these decisions.

[41] Given that the petitioner-husband had sole custody, care, and control of the children, he was not legally required to ensure the children's participation in these activities.

[42] It was crucial to also note the undisputed fact that the petitioner-wife herself had previously caused the children to miss school so that she could take them on a vacation. For her now to accuse the petitioner-husband of similar behaviour revealed a clear double standard, bordering on hypocrisy. If the petitioner-wife herself engaged in this conduct without objection, it was only fair to hold her to the same standard. As the saying goes, "what is sauce for the goose is sauce for the gander," and thus, her criticism lacked credibility and was unacceptable.

[43] As far as missing school was concerned, although it must be frowned upon, a single instance of missing class, did not, in my view, reflect a lapse in parental responsibility or a disregard for the children's educational needs. Consequently, this decision should not be seen as grounds to vary the established terms of custody or parenting arrangements set forth in the court order.

[44] The petitioner-wife also alleged that the petitioner-husband left the children at home alone, unsupervised, while he travelled out of town. Upon reviewing the affidavits, however, it became evident that the petitioner-wife was aware of the petitioner-husband's travel plans. I must, therefore, agree with the petitioner-husband's assertion that the petitioner-wife selectively highlighted incidents to bolster her case in this application.

[45] Furthermore, although the children were indeed unsupervised, the eldest child at that time was 14 years old, which suggested a reasonable degree of maturity. In this context, I found it difficult to understand the concern raised. As the saying goes, "one swallow does not make a summer," and as such, a single, isolated incident could not reasonably be considered a substantial change in circumstances sufficient to justify varying the terms of the court order.

[46] The petitioner-wife had additionally sought sole guardianship of the children. However, it was important to note that the court order did not address the matter of guardianship. Given this omission, it was decided that, in the interest of justice, guardianship should be shared. This was reflected in s. 5 of the Guardianship of Infants Act 1961 ("Guardianship of Infants Act"), which reads:

> Section 5 – Equality Of Parental Rights
>
> (1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and **the rights and authority of mother and father shall be equal.** (emphasis added)

[47] In the present case, guardianship was presumed to be a joint responsibility between both parties unless compelling reasons were presented to warrant otherwise. The petitioner-wife prayed for sole guardianship; however, she had not provided sufficient evidence or arguments to substantiate why such an arrangement would better serve the children's welfare.

[48] In matters of guardianship, the court had to prioritise the best interests of the children, taking into account factors such as stability, emotional well-being, and the ability of each parent to provide care. Given the absence of convincing evidence to support a sole guardianship arrangement, the court found no justification to deviate from the default joint guardianship structure.

Whether Material Change In Circumstances Regarding Spousal And Child Maintenance Had Been Established

[49] According to the court order, the petitioner-wife was to receive a monthly spousal maintenance of RM1,500. In this application, she sought for an increase to a monthly sum of RM5,000. The gist of this application, which sought to vary the terms pertaining to spousal maintenance, was that the petitioner-wife's funds were insufficient to support herself.

[50] I was unable to accept the petitioner-wife's contention for several reasons. First and foremost, it is a well-established legal principle that spousal maintenance is determined based on the 'means and needs' of the parties involved, rather than their 'means and wants.' The purpose of spousal maintenance is to provide for the reasonable needs of a party who may not be financially independent, and not to accommodate a lifestyle that exceeds their financial capability.

[51] Upon carefully reviewing the affidavits submitted, it was evident that the petitioner-wife had been living beyond her means, incurring expenses that were not justifiable based on her financial resources. She was obviously not 'cutting her coat according to her clothes'.

[52] Such behaviour raised concerns about her ability to manage her finances responsibly. The documents adduced highlighted that her spending habits exceeded what her income and assets could reasonably support. This suggested that her claims for higher maintenance were not grounded in a genuine need but rather in an attempt to sustain a lifestyle she could not afford without undue financial support from the respondent. Consequently, I could not find sufficient justification for granting the requested level of maintenance.

[53] It was also crucial to emphasise to both parties that financial maintenance awarded to a former spouse is meant to provide essential support, rather than a source of ongoing income or financial windfall. The primary objective of spousal maintenance is to ensure that the former spouse would be able to maintain a reasonable standard of living while transitioning to a more self-reliant and stable financial situation post-divorce. This financial support is meant to address the genuine needs that may arise as a result of the breakdown of the marriage, rather than to prolong financial dependence indefinitely.

[54] The expectation is that the recipient spouse will actively work towards self-sufficiency over time, acknowledging that the paying spouse is not obligated to provide indefinite financial support. In this regard, spousal maintenance serves as a temporary bridge, a means to help the recipient stabilise and adjust to life outside the marriage. Spousal maintenance is designed to assist the former spouse in rebuilding his or her independence,

acquiring new skills, or re-entering the workforce if necessary. Spousal maintenance, therefore, is transitional support, encouraging both individuals to pursue their respective lives independently and responsibly.

[55] In the present case, the petitioner-wife was already receiving a monthly spousal maintenance allowance, which had been specifically designed to assist her in meeting her financial needs following the divorce. This regular financial support was intended to provide her with a stable foundation during the post-divorce transition, allowing her to maintain a reasonable standard of living. The expectation was that, with this ongoing maintenance, the petitioner-wife would responsibly manage her financial obligations and adjust her lifestyle to fit within the bounds of the financial support provided.

[56] Expecting additional financial assistance beyond what had already been allocated would be avaricious, unreasonable and inequitable. The petitioner-husband should not be burdened with the expectation of providing ongoing additional spousal support simply because the petitioner-wife chose to live beyond her means. Without evidence of extraordinary circumstances – such as unforeseen health issues, significant changes in living conditions, or other substantial hardships – there was no justifiable reason to increase the financial burden on the paying spouse, namely the petitioner-husband.

[57] I also noted that while it was undisputed that the petitioner-wife was currently employed, she had failed to disclose her income and assets in accordance with r. 63 of the Divorce and Matrimonial Proceedings Rules. This omission undermined the credibility of this application and rendered it procedurally flawed. Transparency regarding financial circumstances was a fundamental requirement in these proceedings, as it ensured that any decision regarding spousal maintenance would be based on a complete and accurate picture of the parties' financial situations. The petitioner-wife's failure to comply with this disclosure requirement had cast doubt on the legitimacy of her claims for an increase in spousal maintenance.

[58] Moreover, the fact that the petitioner-wife was employed indicated that she had the capacity to generate her own income and contribute to her own financial stability. Employment provides an opportunity for self-sufficiency, and the expectation is that the earning spouse will take reasonable steps to support themselves to the fullest extent possible. The petitioner-wife's ability to earn an income was a key consideration, suggesting that an increase in spousal maintenance was not justified.

[59] In light of these factors, the lack of financial transparency, coupled with her ability to generate income, significantly weakened the merits of this application for an increase in spousal maintenance.

[60] With regard to child maintenance, in accordance with the court order, both parties were required to contribute RM2,500 each to a shared fund for the children, with any additional expenses to be equally divided between the parties. In this application, the petitioner-wife requested child maintenance of RM10,000, to be paid directly into her bank account, based on her claim for sole custody, care, and control of the children.

[61] I was unable to accept the petitioner-wife's contention for the following reasons. The first crucial point to highlight was that I concluded that there would be no variation to the existing terms concerning the custody, care, and control of the children. This decision was based on the absence of material change in circumstances that would justify an adjustment to the current child maintenance arrangement. Without a significant alteration in the living situation, needs, or well-being of the children, there was no compelling reason to increase the child maintenance amount.

[62] Furthermore, the petitioner-husband, who has sole custody, care, and control of the children, presented a detailed breakdown of their expenses. After reviewing this information, I found that the current financial arrangement was appropriate and adequately addressed the children's needs. The evidence indicated that the petitioner-husband's monthly income was approximately RM14,000, of which RM12,000 was allocated to cover his ongoing monthly commitments, including expenses for the children. This suggested that he was managing his financial responsibilities prudently and in a manner that adequately provided for the children's well-being.

[63] Based on the evidence adduced, it was clear that the current child maintenance arrangement was sufficient to support the children's reasonable expenses and maintain their standard of living. Therefore, without any material change in circumstances or evidence of additional financial needs, there was no justification for revising the financial terms in the court order.

Whether Material Change In Circumstances Regarding Petitioner-wife's Occupancy Of The Matrimonial Home Had Been Established

[64] According to the court order, despite the divorce, the petitioner-wife had the liberty of continuing to reside in the matrimonial home, with a room exclusively reserved for her, which was off-limits to the petitioner-husband.

[65] In this application, the petitioner-wife asserted that the petitioner-husband had forced her to leave the matrimonial home, rendering her unable to continue residing there. As a result, she requested for the court to order the petitioner-husband to provide a monthly rental allowance of RM2,500 to cover her housing expenses. Alternatively, she sought an order for the petitioner-husband to purchase a new property of equivalent value to the matrimonial home for her use.

[66] In my view, the petitioner-wife's claim was without merit and lacked foundation. While the petitioner-husband conceded that the parties were experiencing significant difficulties living together, he explicitly denied that he had expelled her from the matrimonial home. The evidence adduced suggested that the parties had ongoing disputes over their living arrangements, but there was no credible indication that the petitioner-husband had forcibly removed or banished the petitioner-wife from the matrimonial home. On the contrary, the evidence adduced clearly demonstrated that the petitioner-husband was against her decision to leave. It appeared, therefore, that the petitioner-wife's departure was a unilateral choice, and not one driven by any coercive action on the part of the petitioner-husband.

[67] The petitioner-wife, in her affidavit in support, included several police reports in which she alleged that the petitioner-husband had made threats that caused her to fear for her safety. These reports were adduced as evidence by the petitioner-wife to substantiate her claim that the petitioner-husband's behaviour made it impossible for her to remain in the matrimonial home.

[68] In evaluating the relevance and weight of these police reports, attention must be given to s. 157 of the Evidence Act 1950 ('the Evidence Act'), which states:

> Section 157 - Former statements of witness may be proved to corroborate later testimony as to same fact
>
> In order to corroborate the testimony of a witness, any former statement **made by him** whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or **before any authority legally competent to investigate the fact,** may be proved. (emphasis added)

[69] The police reports lodged by the petitioner-wife carried limited probative value, as they amounted to self-serving statements that lacked independent verification. Without corroborating evidence from an impartial or third-party source, the allegations made by the petitioner-wife in these police reports remain unsubstantiated. Specifically, there was no independent evidence supporting her claim that the petitioner-husband had forcibly banished her from the matrimonial home.

[70] As a result, the police reports alone did not provide a sufficient basis to justify varying the existing court order to impose a new obligation on the petitioner-husband to secure separate accommodation for the petitioner-wife. Such material change required more compelling and reliable evidence beyond the unsupported assertions made in the police reports.

[71] I felt it necessary to remind both parties at this stage that the current terms of their living arrangement were those that were mutually agreed upon. This court was not in a position to reconsider those terms solely due to

A disagreements or disputes that have since arisen between them. The petitioner-wife's request to vary the terms of the court order, based merely on conflicts she had with the petitioner-husband, lacked the necessary legal justification for intervention.

B **[72]** Moreover, I observed that the behaviour exhibited by both parties reflected a lack of maturity. As parents of three children, it was crucial that they rise above these personal disagreements and focus on their responsibilities, particularly in ensuring a stable and cooperative environment for the sake of the children. Their conduct should reflect the gravity of their roles as parents, and they should demonstrate a greater C commitment to acting in the best interests of their family.

Whether The Variation Sought Would Be Reasonable And For The Welfare Of The Children

[73] At the outset of the proceedings, it was observed that the petitioner-D wife had based her application on several key provisions of the Law Reform (Marriage and Divorce) Act, specifically ss. 83, 84, 96, and 97. The criteria outlined in ss. 83, 84, and 96 require material change in circumstances, while s. 97 empowers the court to vary the terms of an agreement relating to the custody or maintenance of a child, where it was satisfied that it was E reasonable and for the welfare of the child so to do.

[74] The petitioner-wife argued that, since the terms were established in a consent order, s. 97 of the Law Reform (Marriage and Divorce) Act was applicable. She maintained that a consent order constituted an agreement, and therefore the court must determine whether modifying the terms would F be reasonable and in the best interests of the children's welfare.

[75] At this point, I was obliged to clarify that the petitioner-wife's interpretation of s. 97 of the Law Reform (Marriage and Divorce) Act was incorrect. This was because the parties had previously agreed to the divorce and formalised a consent order through a joint petition, making the resulting G order a court order under s. 96 of the Law Reform (Marriage and Divorce) Act. It was not merely an agreement as defined under s. 97 of the Law Reform (Marriage and Divorce) Act, the terms of which the petitioner-wife was now attempting to vary.

[76] I drew guidance from the case of *W v. H* [1987] 2 MLJ 235. In that H case, the court was tasked with applying the Law Reform (Marriage and Divorce) Act to vary an agreement independently entered into by both the husband and wife. The crucial aspect of this case was that it concerned a separation agreement that was signed privately by both parties, without any judicial involvement or endorsement.

I

[77] The circumstances in *W v. H* were markedly different from the present case, where the document in question was a consent order. Unlike a privately negotiated agreement, a consent order is formally issued by the court, carrying the authority and endorsement of the Judiciary. This distinction meant that the consent order at issue was, in essence, a court order, and not merely an agreement between parties. The precedent set in *W v. H* highlighted the importance of differentiating between judicially sanctioned orders and private agreements, as the legal implications and criteria for modification under each section of the law are significantly different. This distinction was essential for accurately identifying the appropriate legal framework for varying the terms outlined in the court order in question.

[78] As a result, I was of the opinion that s. 97 of the Law Reform (Marriage and Divorce) Act did not apply to this application. However, to ensure that all arguments were fully examined and addressed, I proceeded to assess the merits of this application under s. 97 of the Act. This approach was taken to guarantee that every aspect of the case was considered and that justice was administered thoroughly, demonstrating careful judicial evaluation even in light of procedural inconsistencies.

[79] Pursuant to s. 97 of the Law Reform (Marriage and Divorce) Act, the requirements that needed to be proved were whether the variation was reasonable and in the interest of the welfare of the children.

[80] The welfare of the children, undeniably, served as the "golden thread" throughout these proceedings. This requirement is enshrined not only in s. 11 of the Guardianship of Infants Act but also in s. 88(2) of the Law Reform (Marriage and Divorce) Act, both of which read:

> **Guardianship of Infants Act 1961**
>
> Section 11 – Matters to be considered
>
> The Court or a Judge, in exercising the powers conferred by this Act, **shall have regard primarily to the welfare of the infant** and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.
>
> **Law Reform (Marriage and Divorce) Act 1976**
>
> Section 88 – Power of court to make order for custody
>
> …
>
> (2) In deciding in whose custody a child should be placed **the paramount consideration shall be the welfare of the child** and subject to this the court shall have regard. (emphasis added)

[81] I was also guided by the Federal Court in *Sean O'Casey Patterson v. Chan Hoong Poh & Ors* [2011] 3 CLJ 722, in its reference to the Singapore case of *Tan Siew Kee v. Chua Ah Boey* [1987] CLJU 77; [1987] 1 LNS 77, wherein the expression 'welfare of the child' was explained by Chan Sek Keong JC (as he then was), in the following passage:

> The expression 'welfare' ... is to be taken in its widest sense. It means the general well-being of the child and all aspects of *his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive* to the attainment of such well-being. It is not to be measured in monetary terms.
>
> (emphasis added)

[82] To reach a well-informed decision, this court had to meticulously examine the notion of the "welfare of the child" in its most expansive context, considering all pertinent factors and judiciously balancing them. Given the distinctive circumstances inherent in each case, offering an exhaustive list of specific considerations was not feasible.

[83] As alluded to in the earlier part of this judgment, there was no evidence that the current arrangement pertaining to the custody and maintenance of the children was unsatisfactory. The petitioner-wife had failed to prove that the terms of the current arrangement were unreasonable or detrimental to the welfare of the children. In addition, the petitioner-husband had demonstrated that the children were taken care of to the best of his ability.

[84] I also had grave concerns regarding the potential impact on the children's environment if this application was allowed. Based on the evidence presented, it was my view that the children's current environment was satisfactory. This environment was not only supported by the presence of the petitioner-husband but also by the surrounding circumstances. The petitioner-husband had adduced evidence that demonstrated the children's living arrangements, underscoring a stable and supportive setting. In contrast, the petitioner-wife failed to demonstrate to the court any arrangement that would ensure a comfortable, conducive, and stable living environment for the children.

[85] Furthermore, the children have remained in the matrimonial home, a place where they had spent the entirety of their upbringing and where they had developed a sense of familiarity, stability, and routine. The continuity of this environment was important, as it had been central to their sense of security and normalcy throughout their lives.

[86] This position was reinforced by the precedent established in the case of *Wong Kim Foong v. Teau Ah Kau* [1998] 1 CLJ 358; [1998] 1 MLJ 359, where the court stressed the importance of maintaining a child's stability by preserving their familiar surroundings and relationships.

[87] In contrast, the petitioner-wife's decision to unilaterally move out of the matrimonial home and reside in a rental property nearby would not provide the same stability for the children. This rented accommodation lacked the permanence and consistency of the matrimonial home, making it difficult for her to offer the same secure environment. The unpredictability associated with rented housing, including potential changes in tenancy and the temporary nature of the arrangement, posed a challenge to maintaining a stable and certain environment for the children.

[88] Given these considerations, the decision to leave the matrimonial home appeared to have disrupted the children's sense of continuity, which was essential for their well-being and development.

Whether An Attachment Of Earnings Order Was Justified

[89] The petitioner-wife, in claiming that the petitioner-husband did not pay child maintenance, sought for an attachment order on the petitioner-husband's employer company, NXP Malaysia Sdn Bhd, to automatically deduct all the payments payable (if any) to the petitioner-wife from the petitioner husband's monthly salary. This relief was based on ss. 4, 7, and 8 of the Married Women and Children (Enforcement of Maintenance) Act 1968, all of which read:

> Section 4 – Power of court to make an attachment of earnings order
>
> (1) Notwithstanding any written law to the contrary, the court may, upon the application of the person for whose maintenance the order is made or the guardian of such person, make an attachment of earnings order if the court considers it just so to make.
>
> (2) An application for an attachment of earnings order may be made in the proceedings in which a maintenance order is applied for or in any subsequent proceedings.
>
> ***
>
> Section 7 – Duty of defendant and employer to comply with attachment of earnings order
>
> (1) A person to whom an attachment of earnings order is directed shall, notwithstanding anything in any other written law but subject to this Act, comply with the order or, if the order is subsequently varied under section 6, with the order as so varied.
>
> (2) Where on any occasion on which earnings are to be paid to a defendant there are in force two or more attachment of earnings orders relating to those earnings, then, for the purpose of complying with this Act the employer shall –
>
> (a) deal with those orders according to the respective dates on which they came into force disregarding any later order until all earlier orders have been dealt with; and

(b) deal with any later order as if the earnings to which it relates were the residue of the defendant's earnings after the making of any payment under this Act in pursuance of any earlier order.

(3) An employer, who in pursuance of an attachment of earnings order makes a payment under this Act, shall give to the defendant a statement in writing specifying the amount of that payment.

(4) Where the person to whom an attachment of earnings order is directed has, during the period of one month immediately preceding the day on which the order is served on him, on no occasion been the defendant's employer, he shall forthwith give notice in writing to that effect in the prescribed form to the court.

***

Section 8 – Additional powers of court in attachment of earnings order proceedings

(1) Where proceedings relating to an attachment of earnings order are brought in any court, *the court may,* either before or at the hearing -

(a) order the defendant to give to the court, within such period as may be specified by the order, a statement signed by him of –

(i) the name and address of his employer, or of each of his employers if he has more than one;

(ii) such particulars as to the defendant's earnings as may be so specified;

(iii) such prescribed particulars as may be so specified for the purpose of enabling the defendant to be identified by an employer of his; and

(b) *order any person appearing to the court to be an employer of the defendant to give to the court, within such period as may be specified by the order, a statement signed by him or on his behalf of such particulars as may be specified by the order, of all earnings of the defendant which are to be paid by that person during such period as may be so specified.* (emphasis added)

[90] I did not grant the order for attachment of the petitioner-husband's earnings for the following reasons. First and foremost, this application was specifically for ancillary relief. According to r. 2 of the Divorce and Matrimonial Proceedings Rules, 'ancillary relief' is defined as any of the following:

(a) an avoidance of disposition order;

(b) a financial provision order;

(c) an order for maintenance pending suit;

(d) a property adjustment order; or

(e) a variation order;

[91] Rule 2 of the Divorce and Matrimonial Proceedings Rules does not include an attachment of earnings order within the definition of ancillary relief. If the petitioner-wife intended to pursue an attachment of earnings order, she should have filed a separate application. This application, which was for ancillary relief, should not be confused with an application for attachment of earnings.

[92] On this note, I drew guidance from the case of *Thelagavathi Murugesu v. Karuppusamy K Munisamy* [2010] CLJU 65; [2010] 1 LNS 65; [2010] MLJU 1887. In that case, the plaintiff-wife included a request for an attachment of earnings order within her application to vary the existing court order concerning maintenance payments that the defendant-husband was obligated to provide for their child. This prayer was part of her broader relief for variation to the maintenance order, which aimed to secure a more reliable and direct method of payment by attaching a portion of the defendant-husband's income.

[93] However, the court in that case, dismissed this specific relief for an attachment of earnings on procedural grounds, as the plaintiff-wife had not followed the correct procedure as prescribed by law. Under the Married Women and Children (Enforcement of Maintenance) Act, the court held that an attachment of earnings order must be sought explicitly under s. 5, which provides a dedicated legal mechanism for enforcing maintenance orders through direct deductions from the payer's income.

[94] Additionally, in the present case, there was no sufficient basis or evidence presented to support her request for an attachment of earnings order.

[95] Moreover, an attachment of earnings order is a significant and stringent enforcement measure, one that requires careful consideration by the court. The discretion involved in granting such an order was emphasised in the case of *Yong Jia Hui v. Chan Seh Wai* [2023] CLJU 762; [2023] 1 LNS 762, as highlighted in the following passage:

> [25] It must also be borne in mind that **an attachment of earnings order is a severe form of enforcement** as it involves the Court ordering the Respondent's employer to make monthly deductions, which in turn would reduce the Respondent's income. It is also a form of declaration of the Respondent's financial conundrum which may be embarrassing and damaging to his reputation. Furthermore, I had to note that the Respondent had been regular in making the monthly payment of RM2,000. (emphasis added)

[96] Based on the facts and circumstances of this case, it was my view that an attachment of earnings order would not serve the interest of justice.

A **Concluding Remarks**

[97] At this juncture, it was also crucial to remind parties, that the services of the family court do not extend to babysitting for warring parties or to micromanage family dynamics, especially when parties themselves had agreed to the terms of the court order.

B

[98] The role of the family court is to make decisions that serve the best interests of the child, which include fostering a stable, nurturing environment. The family court aims to provide a clear, structured framework for the child's upbringing, rather than stepping in to handle day-to-day issues or resolve every minor conflict between parents.

C

[99] Judges assess factors like each parent's ability to provide a supportive home, the child's needs and preferences, and the parents' history of cooperation. Once the custody arrangement is set, parents are generally expected to work together in good faith to manage daily parenting decisions without constant court intervention. If ongoing issues arise, parents are encouraged to seek counselling or attend parenting courses, rather than repeatedly returning to court, which would only place undue strain on the child and hinder parental cooperation. Essentially, while courts intervene to protect the child's welfare in high-stakes situations, they are not designed to be the first line of intervention for everyday parenting disputes.

D

E

[100] In this case, it was regrettable that the petitioner-wife, despite initially agreeing to the terms set forth in the court order, chose to amplify minor issues involving the petitioner-husband in an attempt to vary the terms of the court order, which would result in displacing the children, and affecting their current environment. More so, when such terms had been carefully considered and accepted by both parties after thorough consultation with their legal representatives.

F

[101] In the final analysis, the petitioner-wife's dissatisfaction with certain aspects of the court order did not, in itself, constitute grounds to reopen or revise the court order. The principle here is that a court order, once agreed to and finalised, should be respected and upheld unless there was material change in circumstances that justified a revision. The legal standard for varying an agreed court order was deliberately set high to prevent parties from revisiting terms they found inconvenient or unappealing after the fact. This court was not in a position to pander to the needs of litigants to agree to terms and then decide that it is not working out to come to court to air their grievances.

G

H

[102] In conclusion, after considering the aforementioned arguments and conducting a thorough examination of all the evidence presented to this court, encompassing both written and oral arguments from both parties, this application was dismissed with costs.

I